STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 25, 2005
v RONALD D. THOMAS, Defendant-Appellant.	No. 247853 Wayne Circuit Court LC No. 02-013277

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v TYRONE MAURICE SMITH, Defendant-Appellant.	No. 247854 Wayne Circuit Court LC No. 02-011393

Before: Schuette, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendants Thomas and Smith were jointly tried by a jury for a shooting that killed Michael Fluellen and injured Jerard Calhoun. Thomas appeals as of right his convictions for second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Thomas was sentenced to 40 to 60 years in prison for the second-degree murder conviction, 40 to 60 years in prison for the assault with intent to commit murder conviction, 40 to 60 months in prison for the felon in possession of a firearm conviction, and two years' imprisonment for the felony-firearm conviction. Defendant Smith appeals as of right his convictions of second-degree murder, MCL 750.317, and assault with intent to commit murder, MCL 750.83. Smith was sentenced to 20 to 40 years in prison for the second-degree murder conviction and 20 to 40 years in prison for the assault with intent to commit murder conviction. We affirm.

This case arose after defendants, the victims, and some of their other friends went to a rap concert together. Defendant Thomas took some of them in his car and the rest arrived in other

cars. When they arrived at the concert, the victims, Fluellen and Calhoun, were not admitted into the concert hall because they did not have identification showing that they were old enough. They waited outside for their friends, but when the concert ended, defendant Thomas discovered that someone had stolen his car. On the way home, Thomas blamed the victims for the theft. Defendants obtained another car and found the victims in Fluellen's car near Calhoun's girlfriend's residence. Calhoun testified that he and Fluellen exchanged greetings with defendant Thomas, but Thomas suddenly jumped out of his passenger side seat, stepped in front of Fluellen's car, and opened fire on them. Calhoun did not see the type of firearm used because he immediately ducked down toward the driver's side of the car. While Thomas was shooting into the car, Calhoun reached down and put his hand on the accelerator to get away. The shooting left Fluellen dead and Calhoun seriously injured.

Defendants' first issue on appeal is their contention that the trial court erred in sua sponte providing the jury with an instruction on second-degree murder. We review alleged instructional errors de novo. *People v Hubbard*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Defendants suggest that *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), provides for blanket preclusion of jury instructions on lesser-included offenses unless the prosecutor or defendant requests them. However, MCL 768.32(1) provides trial courts with the authority to convict for necessarily included lesser offenses regardless of whether the parties request an instruction or the trial court provides it sua sponte. While a rational view of the evidence must support a lesser-included offense before a trial court may instruct a jury on it, *Cornell*, *supra* at 357, a review of the testimony and evidence in this case demonstrates that the jury could reasonably question whether Smith and Thomas actually planned and deliberated the shootings or whether the events unfolded spontaneously when defendants happened upon the victims. Because second-degree murder is a necessarily included lesser offense of first-degree premeditated murder and a rational view of the evidence could support instruction on the lesser offense, the trial court did not err by providing the jury instruction on its own initiative. *Id*. at 358, n 13. We also reject Thomas's contention that the court's spontaneous instruction violated his constitutional right to notice. Contrary to defendant's argument, "the concern regarding notice to a defendant is irrelevant because the principal charge contains all the elements of the necessarily lesser included offense; thus defendant is already on notice." *Id*. at 359. Defendants claim, in hindsight, that the issue of premeditation and deliberation was not an issue at trial, but rather, only the identity of the shooter mattered. We disagree. Defendants entered a general denial, putting all the elements of the crimes in dispute. *People v Starr*, 457 Mich 490, 501; 577 NW2d 673 (1998). Furthermore, defendant Smith attempted to argue a "mere presence" defense in tandem with his misidentification defense. Therefore, the elements of premeditation and intent were contested, and the trial court did not err by instructing the jury on second-degree murder.

Thomas next asserts that the trial court erred in determining that Calhoun was competent to testify at trial. We review for abuse of discretion a trial court's determination of a witness's competency. *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001). The law presumes that a witness is competent to testify. MRE 601. A court may only declare a witness incompetent if it finds that the witness lacks the capacity or ability to state the truth under oath. *Watson*, *supra*. Defense counsel had ample opportunity to voir dire Calhoun directly, and Calhoun's history of mental illness may have affected his credibility, but did not automatically render him incompetent. We note that Calhoun's testimony at the preliminary examination was consistent with his trial testimony and was corroborated by other witnesses. Therefore, a review

of the lower court record fails to demonstrate an abuse of discretion by the trial court in its determination that Calhoun was competent to testify at trial.

Next, defendants contend that the trial court erred in denying their motions for directed verdicts on the first-degree murder charges and that there was insufficient evidence to convict them of second-degree murder. "When reviewing a trial court's decision on a motion for directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Viewing the evidence in the light most favorable to the prosecution, the prosecutor presented evidence that defendants sought out Fluellen and Calhoun, and had enough time to take a "second look" at their actions before and during the shooting. While defendants challenged Calhoun's mental faculties, Calhoun testified that he knew defendants for years and accurately described them immediately after the shooting and at trial. This evidence was bolstered by another witness who testified that Thomas blamed the victims for the theft of his car. Therefore, the trial court correctly denied the motions. Given the strength of this evidence, the prosecutor also presented sufficient evidence to sustain defendants' second-degree murder convictions.

Regarding the evidence of intent, a factfinder may infer malice or intent from the use of a dangerous weapon. *People v Garcia*, 36 Mich App 141, 142; 193 NW2d 187 (1971). Furthermore, it was not unreasonable for the jury to infer, based on the relationship between Smith and Thomas, that Smith was aware of Thomas' intent to do harm when he drove Thomas to and from the scene. Viewing the evidence in a light most favorable to the prosecution, the evidence presented was sufficient to support the convictions.

Thomas asserts he was denied a fair trial due to the prosecutor's misconduct in arguing, during closing, facts that were not in evidence. Thomas's argument amounts to irritation with the fact that the prosecutor cited the wrong witness as the one who established the time when the concert ended. Defendant has abandoned this issue on appeal by failing to provide any support for his argument that the minor mistake deprived him of a fair trial. *Watson*, *supra* at 587.

Thomas next asserts that his trial counsel was ineffective for failing to investigate or call potentially exculpatory witnesses and in not permitting him to testify on his own behalf. Because Thomas's issue was not properly preserved by timely motion for a new trial or evidentiary hearing, it will be reviewed only to the extent that claimed counsel mistakes are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 363 (1985). Thomas claims that a psychologist who evaluated Calhoun would have provided evidence of his incompetence as a witness. Because we have no record of what the psychologist would have testified about, we will not find ineffective assistance based on this speculative assertion. *Id*. The record is also silent regarding his eagerness to testify on his own behalf and the evidence any other witness would offer. Therefore, Thomas fails to substantiate his claims of ineffective assistance with any citation to the record.

Smith also contends that his trial counsel provided ineffective assistance by abandoning his alibi defense, failing to call alibi witnesses, and refusing to allow Smith to testify on his own behalf. Because Smith ultimately received a *Ginther*[1] hearing, his issue is preserved and we will review the factual findings of the trial court for clear error and the court's constitutional determination de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Effective assistance of counsel is presumed, and defendant carries a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578.

On appeal, Smith contends his trial counsel abandoned his alibi defense, failed to call alibi witnesses or permit Smith to testify in his own behalf. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). On appeal, we will not second-guess defense counsel's strategic decisions. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Furthermore, given the inconsistencies of Smith's alibi witness' testimony, coupled with his close familial relationship with the witness, Smith fails to show how this testimony would have resulted in a different outcome or how its absence contributed to an unfair trial. Similarly, given the limited nature of the eyewitness testimony regarding Smith's presence at the crime, it was sound trial strategy for counsel to attack the credibility of the eyewitness and further suggest that, even if present, Smith was unaware and not involved in the actual shootings. Regarding his counsel's advice not to testify, the record establishes his waiver of that right. When a defendant "decides not to testify or acquiesces in his attorney's decision that he not testify," the right is waived. *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). The failure to have a defendant testify at trial is presumed to be trial strategy, *id*., and cannot be an indictment of counsel's competence merely based on outcome. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Therefore, we do not find counsel's performance deficient.

Smith contends that the trial court erred in omitting the intent element when instructing the jury on aiding and abetting. Smith's counsel failed to object to the instruction to the jury, so this issue is unpreserved. *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). We will not reverse based on an unpreserved issue unless the trial court committed plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Jury instructions are reviewed in their entirety to determine whether a trial court committed error. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Even if imperfect, instructions are not erroneous "if they fairly present the issues to be tried and sufficiently protect the defendant's rights." *People v Tate*, 244 Mich App 553, 568; 624 NW2d 524 (2001). A careful review of all the instructions in their entirety, including an amendatory instruction given by the court on the charge at issue, reveals that the court provided the jury with sufficient instruction on all of the elements of the offense and Smith's substantial rights were adequately protected.

Next, Smith contends that he is entitled to a reversal of his conviction or a new trial based on the failure of the court reporter to completely or accurately record comments during the

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

proceedings by the trial judge. Because Smith's assertion that the court reporter failed to properly or accurately record all comments by the court is not properly preserved, it is reviewed for plain error. *Carines, supra*. Smith asserts that prejudicial comments by the trial judge were unrecorded and not included in the transcript of the proceedings. Smith belatedly attempts to supplement the trial record by presenting affidavits by his family members indicating they witnessed a verbal altercation between two witnesses outside the courtroom and that some jurors were present. Beyond being an inappropriate attempt to expand the record more than one year after the conclusion of the proceedings, the affidavits indicate an exchange between witnesses outside the courtroom, and consequently, the incident was not subject to recording requirements. MCR 7.210(A)(1). There is no indication by any affiant that the incident was reported to the court or counsel, so the court was not required to correct or address the issue. Smith's allegations of record omissions lacks factual basis. A thorough review of the record indicates that the "omitted" comments were actually contained in the record, but in proceedings that were outside the presence of the jury, such as at sentencing. Because defendant failed to provide adequate factual support for his claim, we do not find any plain error.

Finally, defendants contend that the cumulative effect of errors alleged at trial were so prejudicial that they were denied a fair trial. "Because no errors were found with regard to any of the above issues, a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Bill Schuette
/s/ David H. Sawyer
/s/ Peter D. O'Connell